

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

NORM'S TRUCK AND EQUIPMENT,
INC.,

Respondent,

v.

JOSEPH G. PILLING AND LISA B.
PILLING, dba JOSEPH PILLING
ENTERPRISES,

Appellant.

No. 62276-5-I

UNPUBLISHED OPINION

FILED: February 1, 2010

Schindler, C.J. — Norm's Truck and Equipment, Inc. (Norm's Truck), agreed to sandblast and paint two new side dump trailers for Joseph G. Pilling and Lisa B. Pilling, doing business as Joseph Pilling Enterprises (collectively Pilling). Pilling appeals the trial court's decision to dismiss its breach of contract counterclaim against Norm's Truck for damages to replace and install the lights and mud flaps that Norm's Truck lost. Because the unchallenged findings do not support the trial court conclusion that Pilling's breach of contract counterclaim is barred by the economic loss rule, we reverse, vacate the judgment and the award of attorney fees, and remand.

FACTS

Agreement to Paint Trailers

Joseph G. Pilling and Lisa B. Pilling, doing business in Oregon as Joseph Pilling Enterprises, own and operate a demolition, excavation, and mining business. Norm's Truck and Equipment, Inc. is a Washington corporation.

In 2005, Pilling purchased two new unpainted side dump trailers in Washington from Scott Bride of Darling Sons International. Joseph Pilling called Norm's Truck to arrange to have the trailers painted. The owner, Norm Bilbrey, agreed to sandblast and paint the trailers for \$4000 and use the acrylic paint that Pilling would supply. Norm Bilbrey prepared an invoice dated June 8, 2005 that reflects the \$4000 price with a notation to "Install Stripe." The invoice was not sent to Pilling. However, after later clarifying whether the quoted price of \$4000 applied to one or both trailers, Pilling agreed to pay \$3250 to sandblast and paint each of the two trailers.

At Pilling's request, Bride delivered the first trailer to Norm's Truck with several cans of acrylic enamel paint. Norm's Truck lost the cans of paint and used a more expensive paint, IMRON. Norm Bilbrey's son Kevin Bilbrey updated the invoice to reflect the additional cost of using IMRON to paint the trailer with a credit for the lost paint. The total amount to sandblast and paint the first trailer was \$5769.80.¹

Pilling received the trailer in late August and sent Norm's Truck a check for \$5700. Pilling claims the \$5700 included a partial credit for work to be done on the second trailer.

In the beginning of October, Bride delivered the second trailer to Norm's Truck. The lights and mud flaps were delivered with the trailer. An invoice dated October 5,

¹ The invoice states a total of \$6277.54. There is no dispute the invoice incorrectly included Washington sales tax.

2005 for the work done on the second trailer, reflects \$3250 in labor costs and \$1744.14 for the acrylic enamel paint, for a total of \$4994.14.

Pilling sent a driver to pick up the trailer from Norm's Truck with a check dated February 1, 2006 for \$4994.14. A few days later, Pilling discovered that Norm's Truck had not painted a distinctive white stripe on the trailer and the lights and the mud flaps were not installed and were missing.

The parties disagreed about whether Norm's Truck agreed to paint the trailers with a white stripe or instead use two different color tones. Pilling stopped payment on the check. Pilling paid a company in Oregon to replace and install the mud flaps and lights on the second trailer.

On March 9, 2006, Norm's Truck sent Pilling a Notice of Dishonor of Check under the Uniform Commercial Code (UCC).²

Lawsuit

On March 29, Norm's Truck filed a "Complaint for Dishonored Check and for Money Due" in King County Superior Court against Pilling. Representing Pilling pro se, Joseph Pilling sent a letter to the court stating that he only owed \$2374.09 because Norm's Truck used the wrong paint on the first trailer, lost parts on the second trailer, and breached the agreement to paint stripes on both trailers.³ The court treated the letter as an answer to the complaint.

² RCW 62A.3-503.

³ Based on the invoice price of \$4994.14 for painting the second trailer, Pilling asserted that twice that, \$9988.28, was an appropriate price for painting both trailers. Pilling deducted \$900 for the lost paint, \$450 for the stripes not painted, \$564.19 for his cost of replacing and installing the lost parts, and \$5700 for the previous payment.

Arbitration

The case was transferred to mandatory arbitration. Joseph Pilling represented Pilling pro se at the arbitration. The arbitrator found that Pilling was justified in stopping payment, but because Pilling did not assert a counterclaim or setoff, the arbitrator awarded Norm's Truck the total amount of the dishonored check, \$4994.14, plus interest, costs, and statutory attorney fees, for a total of \$6623.12.

This case is governed by Toyota of Puyallup, Inc. v. Tracy, 63 Wash. App. 346, 818 P.2d 1122 (1991). At the time Pilling tendered a check #2962, in the amount of \$4994.14, he had not seen the second trailer, which had missing striping, missing lights. He had previously paid \$5700 'on account' after his first trailer was painted, not having personally viewed or inspected the first trailer. Pilling was justified in stopping payment on the check.

Because Pilling has not asserted a counter-claim or set-off, he is liable for the face amount of the check, \$4,994.14, and interest from Feb[.] 1, 2006, \$848.98, but not for the requested penalties and attorneys' fees.

. . .

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo under MAR 7.1, any party on notice to all parties may present a judgment on the Arbitration Award for entry as final judgment in this case to the Ex Parte Department.

Trial De Novo

Pilling filed a request for a trial de novo. Approximately a month before the scheduled trial date, an attorney filed a notice of appearance on behalf of Pilling. The court granted Pilling's request to file an amended answer and continued the trial for one month.

In the amended answer, Pilling asserted a counterclaim for breach of contract damages. Pilling alleged that Norm's Truck used the wrong paint on the first trailer,

did not paint stripes on either trailer, “fail[ed] to preserve and instal[l] the trailer parts on the second trailer” and did not credit Pilling for replacing and installing the lights and mud flaps. In the alternative, Pilling asserted a counterclaim for breach of bailment alleging that “if plaintiff’s loss of the trailer parts from the second trailer is not a breach of contract, it is a breach of duty as the bailer of said parts.”

At the conclusion of the one-day bench trial, the court found that Pilling agreed Norm’s Truck could use IMRON paint on the first trailer, but that the parties did not reach an agreement on painting the stripes. The court ruled in favor of Pilling on the claim that Norm’s Truck lost and failed to install the lights and mud flaps delivered with the second trailer and awarded Pilling damages of \$564.19 for the cost of replacing and installing the missing parts.⁴ Because the court found that Pilling was entitled to an offset, the court concluded that Norm’s Truck did not meet its burden of proving wrongful dishonor of the check. The court awarded Norm’s Truck judgment against Pilling in the amount of \$4,429.95.

⁴ The Finding of Fact XV and XVI state:

XV.

Defendants also contend that Plaintiff lost and failed to install lights and mud flaps on the second trailer. Mr. Scott Bride testified that when the second trailer was taken from his yard for delivery to Plaintiff, the parts were located in a box in the bottom of the trailer. Mr. Bride was not present when the trailer arrived at Plaintiff’s facility and the driver who delivered the trailer to Plaintiff did not testify. Mr. Kevin Bilbrey testified that he inspected the trailer when it arrived at the Plaintiff’s worksite, and that they did not contain any uninstalled parts, including lights and mud flaps. This statement is not accurate since, according to Mr. Pilling, the second trailer arrived in Oregon with cylinders and airbags. While it is possible that the responsibility for the missing lights and mud flaps lies with Scott McBride or the driver, the Court finds, on a more probable than not basis, that the missing parts were misplaced at Plaintiff’s facility, similar to the acrylic paint for the first trailer.

XVI.

Defendants incurred damages in the amount of \$564.19 to purchase and have mud flaps and lights installed on the second trailer.

Reconsideration

Norm's Truck filed a motion for reconsideration. At the hearing on the motion, the court raised the issue of the economic loss rule and asked the parties to provide additional briefing.⁵

The court ruled on reconsideration that because Pilling's counterclaim for lost parts was barred by the economic loss rule, Pilling was not justified in stopping payment on the check. Conclusion of Law 5 states that "[t]he 'economic loss rule', see Alejandre v. Bull, 159 Wn.2d 674, 153 P.3d 864 (2005), bars Defendants' counterclaim related to the loss of the mud flaps and lights." Conclusion of Law 6 states, "[d]efendants' counterclaims, including those relating to the IMRON paint and the paint striping, are dismissed. Accordingly, Defendants were not justified in stopping payment on the check for the work done on the second trailer."

Pilling filed a motion for reconsideration, arguing that because the breach of contract counterclaim sought economic damages for failure to preserve and install the lost parts, it was not barred by the economic loss rule. In the alternative, Pilling moved to amend the pleadings to include a breach of implied warranty counterclaim under the UCC. The court denied Pilling's motion for reconsideration.

Norm's Trucks filed a request for over \$37,000 in attorney fees. Pilling opposed the fee request as unreasonable. The court entered a judgment in favor of Norm's Truck for \$4,994.14 plus interest, and \$33,727.50 in attorney fees and costs.⁶

⁵ The court ruled that it would not consider Norm's Truck's argument on reconsideration that the printed language in the first invoice released it of liability for the lost parts.

⁶ Contrary to well-established case law, the court did not enter findings of fact or conclusions of law in support of the award of attorney fees. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

Pilling appeals.

ANALYSIS

Pilling argues that the trial court erred in concluding the economic loss rule barred the breach of contract counterclaim against Norm's Truck for the cost of replacing and installing the lights and mud flaps on the second trailer.

We review the trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Unchallenged findings of fact are verities on appeal. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g). Because Pilling does not challenge any of the trial court's findings of fact, we treat the findings as verities on appeal. We review questions of law de novo. Sunnyside Valley Irri. Dist. v. Dickie, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

The purpose of the economic loss rule is to bar recovery for an alleged tort where there is a contractual relationship between parties and the losses are economic losses. Alejandre v. Bull, 159 Wn.2d 674, 683-84, 153 P.3d 864 (2007). "[T]he nature of the loss and the manner in which it occurs" distinguishes economic losses from other losses such as personal injury. Alejandre, 159 Wn.2d at 684. When a party's economic loss potentially implicates contract and tort relief, the economic loss rule limits the party to contract remedies. Alejandre, 159 Wn.2d at 681.

Here, there is no dispute that the damages for replacing and installing the lights and mud flaps lost by Norm's Truck are economic losses. Pilling alleged two

alternative counterclaims to recover the costs incurred to replace and install the lights and mud flaps lost by Norm's Truck—a breach of contract counterclaim, and in the alternative, a breach of bailment counterclaim. Under the breach of contract and breach of bailment counterclaims, Pilling only sought to recover damages for the cost of replacing and installing the lights and mud flaps on the second trailer. The breach of contract and breach of bailment counterclaims allege in pertinent part:

FIRST CAUSE OF ACTION – BREACH OF CONTRACT

...

8. Plaintiff breached its agreement and contract with the defendants by (1) failing to paint the first trailer with the acrylic enamel agreed to between plaintiff and defendant, (2) failing to paint the trailers with the stripes agreed to between the plaintiff and defendant, (3) failing to preserve and instal [sic] the trailer parts on the second trailer, (4) charging defendant for the additional and excess charges for the wrong paint actually used on the first trailer, and (5) refusing to credit defendant for the costs of replacing the parts plaintiff misplaced and lost or had stolen from the second trailer while said trailer was in plaintiff's custody and control.

...

SECOND CAUSE OF ACTION – BREACH OF BAILMENT

...

12. In the alternative, if plaintiff's loss of the trailer parts from the second trailer is not a breach of contract, it is a breach of duty of bailer of said parts. Defendant placed the parts in the custody and control of the plaintiff and had every right to assume that plaintiff would insure the safe keeping of said parts. Plaintiff's failure to keep the parts safe and secure is a breach of its duty as the bailer of said parts.

The court's unchallenged findings of fact establish a contractual relationship between Norm's Truck and Pilling and that Norm's Truck lost the lights and mud flaps that were delivered with the second trailer and were necessary to operate the trailer. The court found that Pilling was entitled to damages for the cost of replacing and

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installing the lights and mud flaps that Norm's Truck lost.

Finding of fact XV states:

Defendants also contend that Plaintiff lost and failed to install lights and mud flaps on the second trailer. Mr. Scott Bride testified that when the second trailer was taken from his yard for delivery to Plaintiff, the parts were located in a box in the bottom of the trailer. Mr. Bride was not present when the trailer arrived at Plaintiff's facility and the driver who delivered the trailer to Plaintiff did not testify. Mr. Kevin Bilbrey testified that he inspected the trailer when it arrived at the Plaintiff's worksite, and that they did not contain any uninstalled parts, including lights and mud flaps. This statement is not accurate since, according to Mr. Pilling, the second trailer arrived in Oregon with cylinders and airbags. While it is possible that the responsibility for the missing lights and mud flaps lies with Scott McBride or the driver, the Court finds, on a more probable than not basis, that the missing parts were misplaced at Plaintiff's facility, similar to the acrylic paint for the first trailer.

Finding of fact XVI states: "[d]efendants incurred damages in the amount of \$564.19 to purchase and have mud flaps and lights installed on the second trailer."

Findings of fact XV and XVI do not support the trial court's conclusion that the economic loss rule bars Pilling's breach of contract counterclaim for the costs incurred by Pilling to replace and install the lights and mud flaps on the second trailer. Based on unchallenged findings of fact XV and XVI, the court erred in dismissing Pilling's breach of contract counterclaim as barred by the economic loss rule.

Norm's Truck did not file a cross appeal. Nonetheless, Norm's Truck assigns error to findings of fact XV and XVI, arguing that substantial evidence does not support the findings. A respondent seeking affirmative relief must file a cross appeal. RAP 5.1(d); Smoke v. City of Seattle, 79 Wn. App. 412, 902 P.2d 678 (1995).

Because Norm's Truck did not file a cross appeal, we will not consider Norm's Truck's argument that substantial evidence does not support findings of fact XV and XVI. In

re Arbitration of Doyle, 93 Wn.App. 120, 127, 966 P.2d 1279 (1998).

We reverse the trial court's conclusion that the economic loss rule bars Pilling's breach of contract counterclaim, vacate the judgment and the award of attorney fees, and remand.

Schindler, CT

WE CONCUR:

Leach, J.

Cox, J.